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JAYAGANESAN RAMAKRISHNAN v. TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS

FEDERAL COURT, PUTRAJAYA
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
BALIA YUSOF WAHI FCJ
B TENGKU MAIMUN TUAN MAT FCJ
ABANG ISKANDAR FCJ
NALLINI PATHMANATHAN FCJ
[CRIMINAL APPEAL NO: 05(HC)-237-10-2018(B)]
17 JUNE 2019

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PREVENTIVE DETENTION: *Habeas corpus – Writ – Detention under s. 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 – Representation before Advisory Board – Whether a matter of detainee's substantive right – Notice thereof – Notice not served on detainee and detainee denied right to make*
D *representation – Whether a material non-compliance – Whether detention nullified*

This was an appeal against the decision of the High Court declining to issue a writ of *habeas corpus* applied for by the appellant for the reason that the appellant's detention pursuant to a detention order issued by the first respondent Minister pursuant to s. 6(1) of the Dangerous Drugs (Special
E Preventive Measures) Act 1985 ('the Act') was substantively and procedurally lawful. Before the learned appellate judges, the appellant argued that the High Court Judge's decision was flawed and ought to be disturbed, as the detaining authority had denied him the right to make his representation before the Advisory Board ('the Board') and was hence guilty of material
F non-compliance. The warden's affidavit as adduced by the respondents indicated that whilst the hearing before the Board was scheduled for 7 June 2017, the notice thereof was explained to the appellant or served on him only on 27 September 2017 and 10 October 2017 respectively. The facts further showed that no corrective affidavit was filed by the respondents as detaining
G authority to address the perceived irregularity, and consequently, an issue arose as to whether the appellant could, in the circumstances, be said to have been lawfully detained.

Held (allowing appeal; issuing writ of *habeas corpus*)
Per David Wong Dak Wah CJ (Sabah & Sarawak) delivering the judgment
H **of the court:**

(1) Section 9(1) of the Act entitles a detainee to make representation before the Board and by r. 5(1) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, the Board is duty bound to appoint a time and place to consider the representation and

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notify the detainee of same. The word 'shall' in the Rules indicates that compliance with this statutory provision is mandatory and non-compliance with same would render the detention illegal. (paras 14 & 15)

(2) The failure to serve the notice on the appellant, as was apparent from the dates in the warden's affidavit, meant that the appellant was unable to make any representation before the Board. The respondents hence failed to meet their burden to justify the legality of the appellant's detention. As the detaining authority failed to meet its burden to satisfy with the strict requirement of the law, the detention was unlawful. (paras 16, 21 & 23)

Bahasa Malaysia *Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana enggan mengeluarkan writ *habeas corpus* yang dipohon perayu atas alasan bahawa penahanan perayu di bawah satu perintah tahanan yang dikeluarkan oleh responden pertama Menteri di bawah s. 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta'), secara substantif dan prosedurnya, adalah sah di sisi undang-undang. Di hadapan yang arif hakim-hakim rayuan, perayu berhujah bahawa keputusan Hakim Mahkamah Tinggi adalah khilaf dan harus diganggui, oleh kerana pihak berkuasa menahan gagal melaksanakan haknya untuk membuat representasi di hadapan Lembaga Penasihat ('Lembaga') sekali gus telah melakukan ketidakpatuhan material. Afidavit oleh warden seperti yang dikemukakan oleh responden menunjukkan bahawa, sementara pendengaran di hadapan Lembaga ditetapkan pada 7 Jun 2017, notis bagi pendengaran tersebut hanya diterang atau diserahkan kepada perayu pada 27 September 2017 dan 10 Oktober 2017. Fakta seterusnya menunjukkan bahawa tiada sebarang afidavit pembetulan dibuat oleh responden selaku pihak berkuasa menahan bagi menjelaskan ketidakteraturan, dan oleh itu, persoalan berbangkit sama ada perayu, dalam hal keadaan yang wujud, boleh dianggap sebagai telah ditahan secara sah.

Diputuskan (membenarkan rayuan; mengeluarkan writ *habeas corpus*)
Oleh David Wong Dak Wah HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Seksyen 9(1) Akta memberi hak kepada orang tahanan untuk membuat representasi di hadapan Lembaga dan berdasarkan k. 5(1) Kaedah-Kaedah Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Prosedur Lembaga Penasihat) 1987, Lembaga berkewajipan untuk menetapkan tarikh dan tempat untuk mendengar representasi serta bertanggungjawab memberitahu orang tahanan mengenainya. Perkataan

A 'hendaklah' dalam Kaedah-kaedah menunjukkan bahawa kepatuhan terhadap peruntukan statutori ini adalah mandatori dan melanggarinya akan menyebabkan penahanan menjadi tak sah.

(2) Kegagalan menyampaikan notis kepada perayu, sepertimana yang terserlah dari tarikh-tarikh dalam afidavit warden, bermakna perayu
B tidak dapat membuat representasi di hadapan Lembaga. Oleh itu, responden gagal memenuhi beban menjustifikasikan penahanan perayu. Memandangkan kehendak undang-undang yang ketat ini gagal dipenuhi oleh responden, maka penahanan adalah tak sah.

C **Case(s) referred to:**
Lui Ah Yong v. Superintendent of Prisons, Penang [1975] 1 LNS 91 HC ***(refd)***
Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Satu Lagi [1994] 4 CLJ 47 SC ***(refd)***
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***
D *Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] 1 LNS 129 FC* ***(refd)***
Re Roshidi Mohamed [1987] 1 LNS 59 HC ***(refd)***
SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***
Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ
E *279* ***(refd)***

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), 9(1)
Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, r. 5(1)

F *For the appellant - Sivananthan Nithyanantham & Jay Moy Wei Jiun; M/s Sivananthan*
For the respondents - Muhammad Sinti; SFC

[Editor's note: For the High Court judgment, please see Jayaganesan Ramakrishnan lwn. Timbalan Menteri Dalam Negeri Malaysia & Yang Lain [2018] 1 LNS 1794 (overruled).]

G *Reported by Wan Sharif Ahmad*

JUDGMENT

David Wong Dak Wah CJ (Sabah & Sarawak):

H **Introduction**

[1] This appeal stemmed from the decision of the High Court refusing to issue the appellant a writ of *habeas corpus*. We heard the appeal on 12 February 2019 and after careful consideration, unanimously allowed it. We set aside the order of the High Court, allowed the appellant's application
I for a writ of *habeas corpus* and ordered that he be released from detention with immediate effect. These are our written reasons.

Background

[2] The appellant was arrested on 3 March 2017 on the allegation that he was involved in activity relating to the trafficking of dangerous drugs. He was detained under the provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act).

[3] Having completed investigations sometime after 18 April 2017, the first respondent studied the relevant investigation reports and exercised his discretion to detain the appellant under s. 6(1) of the Act. To this effect, he issued a detention order dated 27 April 2017 (detention order) which took immediate effect for a period of two years. The appellant was accordingly detained at Pusat Pemulihan Akhlak Machang, Kelantan.

[4] At the High Court, the appellant claimed that his detention was illegal on three grounds. The High Court did not agree with him on any of those grounds.

[5] Before us however, the appellant only canvassed one issue. In gist, he argued that the service of the notice dated 22 May 2017 (notice) ie, notifying him of the hearing before the Advisory Board (the Board), on him was irregular. His hearing before the Board was fixed on 7 June 2017. The appellant claims that he was never taken before the Board to make his representations. He claimed, he was never served with the notice to attend 7 June 2017 hearing.

[6] On this issue, the warden, deposed that on 22 May 2017, he was assigned to explain the said notice to the appellant. In his affidavit, he narrated that he did in fact explain to the appellant that the hearing was to take place on 7 June 2017 at 9am. In concluding the relevant part of his affidavit explaining this matter, the warden said that the appellant understood what was explained to him on 27 September 2017 and 10 October 2017.

[7] The appellant therefore argued that on the face of the warden's affidavit, there had been clear procedural non-compliance as the date of the Board hearing was explained to the appellant after the hearing on 7 June 2017 took place.

[8] In response, the respondents argued that this was a typographical error. Critical to note however, is that there was no corrective affidavit filed on record rectifying or explaining this alleged mistake.

The Decision Of The High Court

[9] On the above point, the High Court observed that there was no procedural non-compliance. The gist of the High Court's judgment reads as follows:

A [55] Mahkamah ini menerima perenggan 7 Afidavit Jawapan Mohd Ilham bin Abdullah, warden penjara yang diikrarkan pada 19 April 2018 yang menyatakan seperti berikut:

> 7. Sesungguhnya, tiada pelanggaran terhadap Kaedah Kaedah tersebut dan proses penyerahan Borang 11 tersebut telah dibuat dengan suci hati dan semua prosedur dan peruntukan undang-undang telah dipatuhi dengan sempurna.

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[56] Justeru, berdasarkan alasan-alasan yang dinyatakan di atas, isu pertama yang dibangkitkan oleh peguam pemohon adalah ditolak.

Our Decision

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[10] The law on *habeas corpus* is trite. It is not a discretionary remedy. The writ must be issued if the court finds that the detenu is illegally or improperly detained. See *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 where at p. 281, Abdoolcader J (as he then was) said as follows:

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> The grant of *habeas corpus* is as of right and not in the discretion of the court as in the case of such extraordinary legal remedies as *certiorari*, prohibition and *mandamus*. It is a writ of right against which no privilege of person or place can be of any avail *R v. Pell And Offly* 84 ER 720. The heavy musketry of the law will always be brought to bear upon any
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> E suggestion of unlawful invasion or infringement of the personal liberty of an individual in the form of *habeas corpus* and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of *State ex rel Evans v. Broaddus* 245 Mo 123 140 that at least in times of peace every human power must give way to the writ of *habeas corpus* and no prison door is stout enough to stand in its way.

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[11] Where a detainee challenges his detention as being illegal, the burden lies on the detaining authority to show that the detention is legal. In *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705 Gopal Sri Ram FCJ held as follows at para. [5]:

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> It is settled law that on an application for *habeas corpus* the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See, *Chng Suan Tze v. The Minister of Home Affairs & Ors And Other Appeals* [1988] 1 LNS 162. In *Mohinuddin v. District Magistrate, Beed* AIR [1987] SC 1977, the Supreme Court of India observed as follows in the context of art. 22 of the Indian Constitution from which is drawn our
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> H art. 151:

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> It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art. 22(5).

[12] Even if a detention was originally made in exercise of valid legal power, said detention may subsequently become invalid over a passage of time. See *Lui Ah Yong v. Superintendent of Prisons, Penang* [1975] 1 LNS 91; [1977] 2 MLJ 226 where at pp. 227-228 Arulanandom J said:

> The second limb of the argument merits greater consideration, ie, whether a detention which at its inception was legal could become illegal as a result of passage of time or for other reasons. The answer to this question will necessarily determine the result of this application ... In view of this it is quite obvious that the authorities have exhausted all avenues and are unable to remove the applicant to his place of embarkation or his country of citizenship. The powers of detention under section 34(1) are clearly and unambiguously limited to detention for the purposes of removal to one of two places, ie, the place of embarkation or country of citizenship and therefore the moment the detaining authorities have failed or found themselves in a position where the object of detention cannot be fulfilled, then it cannot be argued that further detention remains lawful. The purpose of the detention having been frustrated, continued detention a *fortiori* becomes unlawful.

[13] Further, the applicant is entitled to take advantage of any technical defect which has the effect of invalidating the detention. See *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Satu Lagi* [1994] 4 CLJ 47 where at p. 55, Wan Yahya SCJ held as follows:

> [I]n cases of this nature the appellant is nevertheless entitled to take advantage of any technical imperfection which has the effect of invalidating the restrictive order; or to use the precise words of Regby J in *Ex Parte Johannes Choeldi & Ors.* [1960] 26 MLJ 184 at 186:
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> > The distinction, no doubt, is a highly artificial one. But this is an application for a writ of *habeas corpus*, and the applicants in matters which concern their personal liberty, are entitled to avail themselves of any technical defects which may invalidate the order which deprives them of that liberty.

[14] We thus turned to consider the salient provisions of the Act. Section 9(1) of the Act mandatorily entitles any detainee the right to make representations before the Board. Rule 5(1) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ("1987 Rules") stipulates the procedure in the event the Board receives a representation. It reads:

> Subject to the provisions of this Act, when any representation is received by the Secretary, the Chairman **shall** appoint a time and place for the consideration of the representation by the Board and **shall** cause a notice thereof in Form ll in the Schedule to be served on the detained person and his advocate if such advocate is named in Form I. (emphasis added)

[15] The words "shall" as emphasised indicates that compliance with this statutory requirement is mandatory. Non-compliance with mandatory provisions generally renders the detention illegal. See *Re Datuk James Wong Kim MM* [1976] 1 LNS 129; [1976] 2 MLJ 245 where at p. 251, Lee Hun Hoe (CJ Borneo) said this:

> Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, **strict compliance with statutory requirements must be observed in depriving a person of his liberty.** The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. **Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith.** Where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184. (emphasis added)

[16] All the more, we were of the view that the appellant's right to make representations cannot be superfluous, meaningless, or a mere façade. Thus, the failure to serve the said notice on the appellant, as was apparent from the dates in the warden's affidavit, meant that that the appellant was unable to make any representations before the Board. See generally: *Re Roshidi Mohamed* [1987] 1 LNS 59; [1988] 2 MLJ 193, at p. 196.

[17] The only response the respondents could offer us was that the dates indicated in the warden's affidavit were typographical errors. Now, when it comes to affidavits the trite and tested rule regarding how they work, was explained by Shankar J in *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82; [1988] 3 MLJ 332, at p. 84 (CLJ); pp. 333-334 (MLJ):

> [W]hat evidence was there to support that contention? None whatsoever except the say-so of the plaintiff's solicitors in the writ of seizure and sale. The plaintiff did not file any affidavit to contradict the affidavits filed by the claimant. *Where a case is to be decided on a contest of affidavits, the rule is clear. Material allegations which are not contradicted are deemed to be admitted.* (emphasis added)

[18] The case here was plainer than the analogy in the above paragraph. The allegation by the appellant was that he was never brought before the Board. The respondents aver through the warden, that the appellant was served. But, the said affidavit markedly indicates that the appellant was served well past 7 June 2017 hearing date. Their counsel denied this by making a statement from the Bar alleging those erroneous dates as being typos. No corrective affidavit was put before us by the respondents indicating that the dates stated in the warden's affidavit were a mistake.

[19] Therefore, taking the respondents on their own warden's averment, there was plain non-compliance with the mandatory provisions of the law. We considered this in itself warranted the appellant to a writ of *habeas corpus.*

[20] Further, we noted as a passing remark, that we found this typo story to be rather curious. The warden's affidavit indicated two erroneous dates *to wit*, 27 September 2017 and 10 October 2017. These were very specific dates which were some two to three months after the Board hearing on 7 June 2017. It is not to say that the deponent or even the typist simply mistyped the dates. Rather, they specifically inserted two entirely different and comparatively unrelated dates. This, to us, made the typo story harder to believe. We thought that a mistake as grave as this would have necessarily called for a corrective affidavit explaining this alleged glaring error.

[21] In this sense, constrained by the law and the facts of this case, we took the dates as we found them. With that, it was clear to us that the strict requirements of the law were not complied with. Taking the dates at the face value it was clear that the appellant was not served with the said notice before his hearing before the Board. We therefore arrived at the view that the respondents plainly failed to meet their burden to justify the legality of the appellant's detention.

[22] As a corollary, and for the reasons aforementioned, we opined that the court below erred in arriving at the conclusion that it did. In the result, we considered this an appropriate case for appellate intervention.

A **[23]** Thus, in our considered view, as the detaining authority was unable to meet its burden to satisfy us that the strict requirements of the law were met, we arrived at the view that the detention was unlawful and we thereby allowed the appeal. We accordingly issued a writ of *habeas corpus* and ordered the appellant be released forthwith.

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